KER CHEE CHUAN

v.

KATLYN ENTERPRISE (M) SDN. BHD.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
WAN YAHYA J
[CIVIL APPEAL NO. 02 - 128 OF 1990]
29 OCTOBER 1990

LAND LAW: *Auction of land pursuant to default judgment - Certificate of sale issued by Senior Assistant Registrar - Registered proprietor - Caveat - Indefeasibility - Whether proper procedure has been followed - Serious questions to be tried - Sections 337, 340 National Land Code 1965 - Order 47 r. 7 Rules of the High Court 1980.*

The appellant A purchased the said land at an auction conducted by the High Court at Muar. The auction arose from a default judgment obtained by one S against K. By virtue of a certificate of sale issued by the Senior Assistant Registrar (SAR), A was registered as proprietor of the land. The respondent R then applied to set aside firstly the judgment in default of appearance and secondly the sale of land to A on the ground that both the writ and the subsequent process for the sale of the land had not been served on it; K also lodged a caveat on the said land.

A's application for removal of caveat lodged by K was dismissed; hence this appeal. A argues that as an innocent purchaser under O. 47 r. 7 of the Rules of the High Court 1980 (RHC) and the issuance of the certificate of sale by the SAR, the sale of the land became absolute and that A's title was indefeasible.

Held:

[1] (a) The relevant rules of Court pertaining to confirmation of an auction sale are provided in O. 47 r. 7(b) and (g) of the Rules of the High Court 1980.

(b) These rules have not been followed and complied with by the appellant.

[2] There are serious questions to be tried whether the auction sale of the land is absolute and whether registration was effected by sufficient instrument to vest indefeasible title on the appellant under the NLC; these questions have to be decided at trial.

[3] The learned Judicial Commissioner dealt with the facts of the case and not the legal consequence of s. 337 of the NLC and O. 47 of Rules of the High Court; he found that K had discharged his onus as a caveator.

[Appeal dismissed.]

Cases referred to:
Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212

Legislation referred to:
National Land Code 1965, ss. 337, 340
Rules of the High Court 1980, O. 47 r. 7, 7(b), (g)

For the appellant - G. Sri Ram (Joseph Yeo & C. Subbayah with him); M/s. C. Subbayah & Associates
For the respondent - Ng Chew Hor; M/s. Leng & Co.

JUDGMENT

Mohd. Yusoff Mohamed SCJ:

This appeal concerns the removal of caveat lodged against the land held under Grant No. 10726 for Lot No. 1379 situated in the Mukim of Simpang Kanan, District of Batu Pahat in the State of Johore.

The appellant (caveatee) who sought the removal of the caveat had purchased the land on 14 July 1988 at an auction conducted by the High Court at Muar. The auction of the land had arisen from default judgment obtained by one Mr. M. Suppiah (Suppiah) against the respondent (caveator) in a Suit No. 23 - 42 - 1987 for failure by respondent to pay the full purchase price of the land which had been sold to them by Suppiah.

By virtue of a certificate of sale issued by the Senior Assistant Registrar of the High Court at Muar dated 13 August 1988, the appellant was registered on the land title as proprietor of the land.

The respondent has since applied to set aside the judgment in default of appearance entered against it and the sale of the land to the appellant consequent to a prohibitory order dated 3 March 1988, issued by the High Court, on the ground that both the writ and the subsequent process for the sale of the land had not been served on it. On 22 November 1988 the respondent also lodged this caveat.

In dismissing the appellant's application the learned Judicial Commissioner in his judgment held:

> As I see it Katlyn (respondent) has discharged the onus placed on it to establish that the caveat should remain pending disposal of the main issue namely who is the true and rightful owner of the land in question.
>
> As I see it there should be a trial to ascertain whether or not Katlyn paid Suppiah for the land. It also has to be judicially determined whether the writ in *Suppiah' s* case was duly served on Katlyn. If the writ was not duly served it would seem that all proceedings in the suit subsequent to the issue of the writ are open to question and liable to be set aside.

The main contention by the appellant's Counsel is that as an innocent purchaser under O. 47 r. 7 of the Rules of the High Court 1980 and the issuance of the Certificate of Sale by the Senior Assistant Registrar, the sale of the land became absolute. The appellant's title, he argued, in that way has become indefeasible. He further contended that since the respondent's application to set aside the default judgment was made after the issue of the Certificate for Sale by the Senior Assistant Registrar, the respondent has no more interest in the land.

It is not disputed that s. 337 of the National Land Code (NLC) requires that the auction sale of the respondent's land for the purpose of satisfying any judgment debt has to be confirmed by an order of the Court and that after confirmation the transfer has to be executed by an officer of the Court on behalf of the respondent by an appropriate instrument of transfer under the Act.

Section 337 of the NLC provides:

> 337. (1)No sale of any land or interest for the purpose of satisfying any judgment debt shall become absolute until it has been confirmed by an order made pursuant to rules of Court; and any such order shall be sufficient authority for an officer of a Court of competent jurisdiction to execute in favour of the purchaser at the sale the appropriate instrument of transfer under this Act in the name, and on the behalf, of the judgment-debtor.

(2) The prohibition imposed by any prohibitory order shall not apply to any such instrument of transfer.

The relevant rules of Court pertaining to such confirmation are provided in O. 47 r. 7(b) and (g) of the Rules of the High Court.

Order 47 r. 7(b) states:

(b) The particulars and conditions (of sale) shall be drawn up by the sheriff or by his solicitor, and shall be submitted for the approval of a Judge. At least two clear days' notice in writing of an appointment to obtain the approval of the Judge shall be served on the judgment creditor and judgment debtor at their addresses for service respectively, unless the Judge shall in any case otherwise order; and

Order 47 r. 7(g) states:

(g)(i) Where no application is made under para. (e) or (f) or where such application is made and disallowed, the Court or a Judge shall make an order confirming the sale, and thereupon the sale shall become absolute: provided that no such order shall be made until after the expiration of one month from the date of the sale;

(ii) Where such application is made and allowed, the Court or a Judge shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby;

(iii) No suit to set aside an order made under this paragraph shall be brought by any person against whom such order is made;

Paragraphs (e) and (f) referred to in r. 7(g), which are not applicable here, relate to application to setting aside the sale by those persons who are affected by the sale and setting aside of the sale by the purchaser respectively in circumstances provided therein.

It is also not disputed that these provisions of the rules in the Rules of the High Court had not been followed and complied with by the appellant. The issue is therefore contentious whether the auction sale of the land by the Court on 14 July 1988 is absolute.

Relying on *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85 the learned Counsel for the appellant contended that it is no matter whether the instrument of transfer has no legal effect or void. The fact that the appellant is now a registered proprietor of the land, he argued, is effective to vest an indefeasible title on him.

Section 340 of the NLC speaks of indefeasibility of title and interest and subsection (2)(b) provides:

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument;

On sufficiency of instrument of transfer to be effected for registration, the learned Counsel on behalf of the respondent contended that s. 337 of the NLC requires that appropriate instrument of transfer under the NLC should be executed on behalf of the judgment debtor and s. 217 specifically provides that the transfer under the Act shall be effected by instrument in Form 14A.

He submitted that this requirement was not followed. The Senior Assistant Registrar's Certificate of Sale embodying the transfer instrument of the land on behalf of the respondent does not follow any specific form provided by the NLC or Rules of the High Court and it cannot therefore be said that an appropriate instrument sufficient to effect the transfer has been executed.

It is fairly obvious that the present facts is distinguished from *Doshi v. Yeoh Tiong Lay*. There, appropriate instrument of transfer in Form 14A was executed by the parties but it was alleged that the attestation clause in the Form was false to the knowledge of the attestor and it was held that the instrument was sufficient to confer registrable interest over the land.

In these arguments, there is, in our view, serious questions to be tried whether the auction sale of the land is absolute having regard to the Rules of the High Court and whether registration was effected by sufficient instrument to vest indefeasible title on the appellant under the NLC. These questions have to be decided at trial of this suit.

The learned Judicial Commissioner, however, dealt with the facts of the case and not the legal consequence of s. 337 NLC and O. 47 of the Rules of the High Court although they were argued before him. He found that the respondent as caveator has discharged the onus establishing that the caveat should remain pending the disposal of the issues raised. He has correctly applied the principle in *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212 and satisfied that the balance of convenience show that it is better to maintain *status quo* until trial of the action scheduled in his Court.

In our view, on the facts before him, the learned Judicial Commissioner has exercised his discretion correctly and has not acted contrary to recognised principles of law.

In this view, this appeal is dismissed with costs here and below. Deposit to respondent to account of taxed costs.

Also found at [1991] 1 CLJ 250